

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ERIC WILTON BURTON,

vs.

DIRECTOR, CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION,

Petitioner,

Respondent.

CASE NO. 08CV0325-LAB (POR)

**ORDER GRANTING STAY AND
ABEYANCE**

[Dkt Nos. 41, 47, 61, 63, 78]

I. Introduction

Petitioner Eric Burton ("Burton") is a man of many pleadings. Now pending before the Court is his Motion for Stay and Abeyance, as well as Respondent's Motion to Dismiss Burton's First Amended Petition for Writ of Habeas Corpus. (Dkt. Nos. 47, 41.) Related to these is Burton's Motion for Ruling on Stay and Abeyance, Motion to Correctly State Petitioner's Opposition to Motion to Dismiss, and Motion to Take Judicial Notice. (Dkt. Nos. 61, 63, 78.)

Burton filed his amended habeas petition in this Court on June 20, 2008. (Dkt. No. 21.) Respondent moved to dismiss Burton's amended habeas petition, for failure to exhaust state court remedies, on September 22, 2008. (Dkt. No. 41.) Pursuant to 28 U.S.C. § 636 Magistrate Judge Porter issued a Report and Recommendation ("R&R") addressing both

1 motions on December 10, 2008. (Dkt. No. 65.) By the Court's count, Burton filed five
 2 separate objections to the R&R, which is surprising given that the R&R favors granting his
 3 Motion for Stay and Abeyance. (Dkt. Nos. 66, 70, 72, 74, 76.) Respondent did not oppose
 4 Burton's Motion for Stay and Abeyance, nor did Respondent object to the R&R.

5 **II. Discussion**

6 The basis of Respondent's motion to dismiss is ground three of Burton's habeas
 7 petition, which accuses his trial prosecutors of failing to disclose material exculpatory
 8 evidence – and which Respondent claims is unexhausted. That evidence, allegedly, relates
 9 to a witness that Burton discovered was a bailiff from the state court. Respondent is right
 10 to assert that a federal court “may not grant federal corpus habeas relief unless the petitioner
 11 has exhausted his state court remedies with respect to all claims contained in the petition.”
 12 (Mot. to Dismiss 3.) Respondent admits, however, that in limited circumstances, and where
 13 there is good cause for the failure to exhaust, “a district court may stay a mixed petition
 14 [containing exhausted and unexhausted claims] and hold it in abeyance while the petitioner
 15 returns to state court to exhaust his unexhausted claims.” (Mot. to Dismiss 6.) The R&R
 16 suggests that there is good cause for Burton's failure to exhaust ground three in state court.
 17 This Court agrees.

18 The Court is guided here by *Rhines v. Weber*, 544 U.S. 269 (2005). In *Rhines*, the
 19 Supreme Court held that

20 it likely would be an abuse of discretion for a district court to
 21 deny a stay and to dismiss a mixed petition if the petitioner had
 22 good cause for his failure to exhaust, his unexhausted claims
 are potentially meritorious, and there is no indication that the
 petitioner engaged in intentionally dilatory litigation tactics.

23 *Id.* at 278. The R&R considered each of these three factors to the Court's satisfaction.
 24 Burton maintains that he learned of the exculpatory evidence only recently, right before he
 25 filed his federal habeas petition, and he has filed another state habeas petition to pursue the
 26 issue. The Court finds sensible the R&R's conclusion that the

27 the exhaustion requirement will in all likelihood be satisfied
 28 before the Court could conduct the necessary inquiry into
 whether [Burton's] allegations are sufficient to support good
 cause under *Rhines*, and it would appear that a longer delay

1 would be caused by developing the record in this regard than
2 awaiting the actual exhaustion of state court remedies.

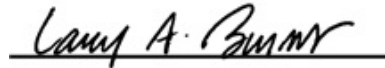
3 (R&R 3.)

4 **III. Conclusion**

5 The Court adopts the R&R. Burton's Motion for Stay and Abeyance is **GRANTED**,
6 and this action is stayed pending resolution of Burton's pending state habeas petition.
7 Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus is **DENIED** without
8 prejudice. Burton is to provide a status update of his habeas petition in the California
9 Supreme Court within 30 days of the date this Order is entered. He is encouraged not to file
10 multiple and unnecessary pleadings in the interim or thereafter, as he has in the past. That
11 only makes it harder for the Court to give his case the focused attention it is due. Finally,
12 the Court recommends that the Attorney General re-file its Motion to Dismiss once all of the
13 issues are fully before the Court.

14 **IT IS SO ORDERED.**

15 DATED: April 7, 2009

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17 **HONORABLE LARRY ALAN BURNS**
18 United States District Judge
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